IN THE

Supreme Court of the United States

October Term, 1948.
No. 355

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG,
Respondents.

RESPONDENTS' MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING.

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SUBJECT INDEX

STATUTES

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RESPONDENTS' MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Respondents respectfully move this Honorable Court for leave to file their petition for rehearing in the above entitled matter.

That respondents were absent from the City of Los Angeles at the time of the rendition of the decision in the above matter April 25, 1949, but counsel for respondents immediately informed business associates of respondents of the decision and requested prompt advice respecting their decision to file a petition for rehearing.

That counsel for respondents was not advised until May 12, 1949, that respondents desired to petition for a rehearing and by reason thereof counsel was unable to ask for an extension of time within which to file said petition.

That counsel is informed that respondents and their said business associates through inadvertence and mistake failed to advise counsel of their said decision until said date by reason of their mistakenly believing that more than 15 days were available for the filing of such a petition.

That it is respectfully urged that, in the interests of justice, respondents should be permitted to file their petition for rehearing.

That respondents respectfully pray that this Honorable Court make its order permitting them to file the following petition for rehearing.

Respectfully submitted,

DEWITT MORGAN MANNING,
Attorney for Respondents.

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BERL B. ZOOK and WILMER K. CRAIG,

Respondents.

PETITION FOR REHEARING.

That respondents, BERL B. ZOOK and WILMER K. CRAIG, respectfully petition for a rehearing in this Honorable Court upon the following grounds, to wit:

I.

The majority of the Court erred in its statement of the applicable law in the case in that the decision of the Court held that double punishment, *i. e.*, punishment by both the State of California and the Federal Government, is permissible.

II.

The majority of the Court erred in its statement of the applicable law in the case in that the decision of the Court held that State action did not conflict with Federal action.

III.

The majority of the Court erred in its statement of the applicable law in the case in that the decision of the Court held that Congress did not intend to preempt the whole field of interstate commerce in question.

ARGUMENT

I.

The Majority of the Court Erred in Its Statement of the Applicable Law in the Case in That the Decision of the Court Held That Double Punishment, i. e., Punishment by Both the State of California and the Federal Government, Is Permissible.

The majority opinion concedes that the possibility of double punishment is an important factor to be considered. While double punishment in some instances may be constitutionally perimissible, the imposition of double punishment for the same offense is increasingly abhorrent as an invasion of civil liberties. This Court has consequently been reluctant ever to find Congressional intent to impose double punishment.

Jerome v. United States, 318 U. S. 101, 105.

In the face of this, to find Congressional intent to share its jurisdiction with the State of California is, in the words of Mr. Justice Frankfurter immediately preceding the foregoing point, "a strained and strange way of interpreting the mind of Congress." (Opinion of Mr. Justice Frankfurter, 2.)

II.

The Majority of the Court Erred in Its Statement of the Applicable Law in the Case in That the Decision of the Court Held That State Action Did Not Conflict With Federal Action.

Mr. Justice Murphy for the majority of the Court asserts that there is no conflict between the provisions of the Federal and California statutes (Majority Opinion, 10). Mr. Justice Frankfurter, in his dissent, points out an important conflict in the matter of penalties. The California statute imposes a fine of not over $250.00 or imprisonment for not over 90 days, or both, for the first offense (California Penal Code Section 654.3). The Federal statute imposes a fine of not more than $100.00 for the first offense (49 U. S. C. A. Section 322(a)).

It was stated in *Southern Railway Co. v. Railroad Commission*, 236 U. S. 439, at page 446, "The States thereafter could not legislate so as to require greater or less or different equipment; *nor could they punish by imposing greater or less or different penalties.* . . . ." (Italics ours.)

The majority opinion attempts to distinguish the *Southern Railway Co.* case upon the ground that it was concerned with the "time honored I. C. C. control over the railroads" (Majority Opinion, 12). This attempted distinction ignores the fact that the I. C. C. has been charged equally with control over the motor carriers of the nation in the National Transportation Policy declared at the very

beginning of that portion of the Interstate Commerce Act here involved (49 U. S. C. A. immediately preceding Section 301).

Other conflicts between the California statute and the Federal statute are ingeniously set forth in Appendix C of the dissenting opinion of Mr. Justice Burton (dissent of Mr. Justice Burton, 45-50). Thus, the statutory text of the respective statutes conflicts. The California Act penalizes one arranging transportation over the lines of a carrier uncertificated by the I. C. C.; the Federal Act penalizes the same act as the State statute, and further penalizes the failure of the one arranging for the transportation to obtain a broker's license. Different exemptions are provided. Thus, in the Federal Act certified or permitted carriers and their employees and agents are exempted. Except with respect to hours of service of employees and safety standards, the transportation of school children, taxicab transportation, hotel transportation, national park vehicles, agricultural commodities transported by motor vehicles by any farmer, cooperative associations' vehicles, vehicles transporting agricultural commodities, and transportation within a municipality, are exempted by the Federal Act. On the other hand, Section 654.2 of the Penal Code exempts persons arranging transportation over uncertificated carriers where no compensation is paid, where the transportation is to or from work of employees engaged in farm work on a farm owned by the State of California, where the transportation is furnished employees of non-profit cooperative associations organized

under the laws of the State of California, where the transportation is within the limits of a single municipality, where the transportation is within a national park, and where the owner of a vehicle makes arrangements to transport persons to and from work while he himself is going to and from work. Mr. Justice Burton further points out in Appendix C to his opinion the mutual exclusiveness of the State and Federal regulations assigning intrastate regulations to the State and interstate regulations to the I. C. C., upon its finding it necessary.

If, therefore, conflict is the test, it is submitted that conflict here is clear. The difference in penalties alone brings the instant case within the interdiction of the rule laid down in the *Southern Railway Co.* case, *supra*. The majority opinion concedes that both Federal and State enactments punish exactly the same thing (Opinion of Mr. Justice Murphy, 4, 5).

If, therefore, as hereinbefore shown, and as elaborately developed in the dissent of Mr. Justice Burton, conflict does exist, then under the very rule enunciated in the majority opinion, the judgment of the Appellate Department of the Los Angeles Superior Court should be affirmed.

III.

The Majority of the Court Erred in Its Statement of the Applicable Law in the Case in That the Decision of the Court Held That Congress Did Not Intend to Preempt the Whole Field of Interstate Commerce in Question.

Predicated upon the asserted lack of conflict between the Federal and State statutes, upon the asserted absence of State regulation at the time Congress and the Interstate Commerce Commission acted, and upon the asserted shortage of Interstate Commerce Commission enforcement personnel (Opinion of Mr. Justice Murphy, 10, 11), the majority opinion discerns an intention of Congress to permit State action in the field, even though the Congressional Act and the Interstate Commerce Commission's administrative action in M. C. 35 had fully covered that field. The existence of real conflict has been shown in respondents' argument under the previous point.

With respect to the existence of State regulation, the State of California beginning in 1931 through 1946 evidenced an intention to regulate travel bureaus only until the Federal Government should act in the field.

California Statutes of 1931, Chapter 638, pages 1362, *et seq.*;

California Statutes of 1933, Chapter 390, page 1012;

California v. Thompson, 313 U. S. 109;

People of the State of California v. Edmondson, Los Angeles County Superior Court, Appellate Department, Cal. App. 2100; cert. denied 329 U. S. 716;

People v. Van Horn, 76 Cal. App. 2d 753.

It is, therefore, clear that when the Motor Carrier Act of 1935 was enacted by the Congress, as Part 2 of the Interstate Commerce Act, and when the investigations leading to the issuance of the decision and order of the Interstate Commerce Commission in *Ex parte* M. C. 35, were held, and when the decision itself was issued in 1942, the Congress and the Commission were confronted with California legislation regulating the very subject involved, but which avowedly by its terms was to terminate so far as regulation of any interstate commerce was concerned upon the entry of Congress through the administrative action of the Interstate Commerce Commission into the field. Then, surely, it was the intention of the Congress and the Interstate Commerce Commission to terminate that control and regulation of the State of California when M. C. 35 was promulgated, because under the very reasoning of the majority opinion the Congress and the Interstate Commerce Commission knew that the State regulation of California would terminate upon the entry of Federal regulation in the field.

What has just been said answers the statement in the majority opinion (p. 11) that "Since the I. C. C. order was issued after *California v. Thompson*, one would expect the federal agency to be specific if it intended to supersede state laws." What need to be specific when the I. C. C. knew that the California legislation would terminate by its own provisions?

Mr. Justice Burton, at page 26 of his dissent, quotes the opinion in M. C. 36 to the effect "that State and local officials are unable properly to regulate such operations because of the fact that a large proportion of the transportation is interstate." The specific intention

of the Interstate Commerce Commission to undertake the policing of a situation it found beyond the capabilities of State officials indicates clearly an intention not to share jurisdiction with the State of California. The argument from the asserted fact that the Interstate Commerce Commission lacks or did lack sufficient enforcement personnel that Congress intended to share its jurisdiction in this case with the State of California reduces itself to absurdity upon examination. If, in any report of the Director of the Mint, complaint be made of lack of personnel, can we then infer a Congressional intent to permit the States to coin money? If the Secretary of State reports a shortage of diplomatic personnel, may the States then send Ambassadors to foreign countries? If the National Labor Relations Board reports a shortage of personnel, may the States create administrative board to regulate the relations of labor and management, contrary to what was held in *Bethlehem Steel Co. v. State Board*, 330 U. S. 767, 775?

Thus, it appears that since there is conflict between the Federal and State statutes, since there was State legislation which was superseded by the Interstate Commerce Commission's action, and since the Interstate Commerce Commission itself discerned a problem incapable of solution by State action, the intention of Congress was not to share its jurisdiction with the State of California.

The majority opinion criticizes respondents' contention that coincidence is as fatal as conflict, insisting that such a theory would eliminate the rights of the States to legislate respecting the payment of obligations by dealers in perishable commodities, or to punish extortion or robbery from interstate commerce, or to punish the wrecking of a bridge over interstate commerce, or to transmit a ran-

som note in interstate commerce (opinion of Mr. Justice Murphy, 7). Certainly, fields of criminal activity may well be within the exclusive purview of Federal statute, and State action in the premises may be forbidden. *Cf. State v. Harper*, 48 Mont. 456, 138 Pac. 495, and *In re Squires*, 144 Vt. 285, 44 A. 2d 133.

However, the real answer to this suggestion in the majority opinion, as well as the answer to the citation by Mr. Justice Murphy of *Ex parte Siebold*, 100 U. S. 371, 390; *Fox v. Ohio*, 5 How. 410, and *United States v. Marigold*, 9 How. 560, is to be found in *Southern Railway Company v. Railroad Commission*, 236 U. S. 439, at page 445, where the court said:

> "In support of this position numerous cases are cited which, like *Cross v. North Carolina*, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and Federal regulation and thus violates the laws of both; or, where there is this double effect in a matter of which one can exercise control but an authoritive declaration that the paramount jurisdiction of one shall not exclude that of the other . . ."

The *Cross* case was predicted squarely upon *Ex parte Siebold*, *supra*; *Fox v. Ohio*, *supra*, and *United States v. Marigold*, *supra*.

In the instant case not only is the authoritive declaration of Congress' intention to share its jurisdiction with the State of California completely lacking, but the majority opinion injects the novel requirement that the declaration of an intention to exclude the States must be specific (opinion of Mr. Justice Murphy; 11). The majority opinion cites four cases in support of this point:

1. *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, noted that at the time the controversy arose the I. C. C. had not acted under authority previously given by Congress to regulate the hours of labor of motor carrier drivers and that, until the Interstate Commerce Commission promulgated such regulations (as it subsequently did), the State might validly legislate on the subject;

2. *Mauser v. Hamilton*, 309 U. S. 598, held that since the Congress had not delegated authority to the I. C. C. to regulate the mode of construction of motor vehicles moving in interstate commerce in the transportation of automobiles, the State of Pennsylvania may validly legislate concerning the construction of such vehicles;

3. *Kelly v. Washington*, 302 U. S. 1; there the Court found that the Congress had not legislated respecting the inspection of certain classes of vessels and that the State of Washington might, therefore, properly do so saying at page 10, "Congress may circumscribe its regulation and occupy a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced;

4. *Mintz v. Baldwin*, 289 U. S. 346; this case also held that Congress had not completely occupied the field, and that there remained a sphere for State action. That circumstance alone distinguishes this case where the field has been fully occupied by Congress and administrative action by the Interstate Commerce Commission pursuant to Congressional authority.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, is also cited for the proposition that the Federal provisions must be inconsistent with those of the State to justify striking down the State legislation. It must be recalled that although the Alabama statute in question occupied a segment of the field different from that occupied by the Federal legislation, the Court found the State legislation inconsistent with the spirit and intent of the Federal legislation and, therefore, invalid; the instant case, of course, goes a step farther—here State and Federal legislation coincide and, as hereinafter pointed out, that very circumstance has heretofore led the Court to the conclusion that Congress did not intend to share its jurisdiction.

The majority opinion also cites *Hines v. Davidowitz*, 312 U. S. 52, for the same principle; it may be noted that the State legislation in that case was struck down as unconstitutional, the Court citing *People v. Compagnie G. T.*, 107 U. S. 59, at page 63, to the effect that the Federal law "covers the same ground as the New York statute, and they cannot co-exist."

Of course, where Congress has not legislated on the precise segment of the field covered by the State action, the Court must seek a clear manifestation of a congressional purpose to displace local laws. Such a case is *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148. Al-

though the Alabama Act there in question contained provisions which covered ground other than that covered by the Federal statute, this Court nevertheless held that the spirit and intent of the Federal enactment was that the State should not act at all in the field. Certainly the Federal statute in the *Cloverleaf* case did not by terms exclude State action; it did not even cover the same segment of the field of regulation as that covered by the State statute. Yet, in the instant case, where Congress has acted in the very matter covered by the State statute, the majority opinion insists that specific Congressional intent to exclude State action must appear. It is submitted that on the contrary there must be found the clearest evidence of Congressional intention to share its jurisdiction in a case like this; indeed, before considering the validity of State legislation under the circumstances here existing, the expression in so many words by Congress of its intention to share its jurisdiction should be required. *Cf. Panhandle E. Pipeline Co. v. Public Service Commission of Indiana*, 332 U. S. 507. (Preliminary Print.)

In those cases where this Court has found that Congress has entered the field completely under the Commerce Clause, as here, this Court has almost uniformly stricken down coincident State legislation, where there is no express declaration by Congress of its intention to share its jurisdiction.

Prigg v. Pennsylvania, 41 U. S. 539, 617;

Charleston & Carolina Railway v. Varnville Furniture Co., 237 U. S. 597;

Southern Railway Co. v. Railroad Commission, 236 U. S. 439, 448;

Bethlehem Steel Co. v. State Board, 330 U. S. 767, 775;

People v. Compagnie G. T., 107 U. S. 59, 63.

If respondents are mistaken in asserting that coincidence is as fatal as conflict, then it is respectfully urged that respondents are correct in asserting that where coincidence exists under the Commerce Clause, it is the intention of Congress that the Federal enactment supersedes the State enactment in the absence of an express declaration by Congress of its willingness that State legislation on the precise subject co-exist.

Nothing in *Asbell v. Kansas*, 207 U. S. 251, conflicts with the principle announced in the last cited cases. The *Asbell* case clearly recognizes the principle contended for by respondents, at page 256, where the Court, by Mr. Justice Moody, stated:

> "Tested by these principles, the statute before us is an inspection law and nothing else, it excludes only cattle found to be deceased, and *in the absence of controlling legislation by Congress* it is clearly within the authority of the State . . . ." (Italics ours.)

The *Asbell* case clearly turned on the fact that there had been no administrative action by the Secretary of Agriculture which brought the Federal legislation into the particular segment of the field in question covered by the State legislation. The Court said, at page 258:

> "Rule 13 issued by the Secretary of Agriculture under the authority of the statute is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined states, which is not this case, and that in terms it recognizes restrictions imposed by the state of destination."

Subsequent cases emphasize the validity of this distinction between the *Asbell* case and the instant case.

Oregon-Washington Co. v. Washington, 270 U. S. 87, 95;

Must Hatch Incubator Co. v. Patterson, 27 F. 2d 447, 449;

Mintz v. Baldwin, 289 U. S. 346, 351, 352.

Conclusion.

It is respectfully submitted that in occupying the instant field Congress did not intend to share its jurisdiction with the State of California, because:

1. No express Congressional intent to impose double punishment can be found here;

2. Conflict exists between the terms of the Federal statute and the California statute with respect to punishment, acts covered, exemptions, and purposes;

3. The Interstate Commerce Commission acted avowedly to control a difficulty which the Commission found incapable of solution by the State authorities;

4. The Congress and the I. C. C. knew that occupation of the field by Interstate Commerce Commission orders would cause the then existing California legislation to fall by its own terms with respect to interstate commerce;

5. Historically the complete occupation of a particular field of activity in interstate commerce by Congressional action has led this Court to the conclusion that the Congress intended that its jurisdiction should be exclusive, a circumstance which Con-

gress may be presumed to have considered in enacting the instant legislation and which the I. C. C. may be presumed to have considered in promulgating. *Ex parte* M. C. 35.

For the reasons given, it is respectfully urged that a rehearing should be granted in the instant matter, and that upon such rehearing the judgment of the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles should be affirmed.

Respectfully submitted,

DEWITT MORGAN MANNING,
Attorney for Respondents.

Certificate of Counsel.

DeWitt Morgan Manning, counsel for respondents herein, hereby certifies that the foregoing petition is presented in good faith and not for delay, and that the petition for rehearing is restricted to grounds arising by reason of said opinion and matters therein set forth.

DEWITT MORGAN MANNING,
Attorney for Respondents.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A. D. 1949.

5-16-49—60